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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 345

BENJAMIN COLBY, *Petitioner*,

v.

SARAH P. COLBY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

Petitioner prays that a writ of certiorari issue to review a judgment of the Supreme Court of Nevada entered on March 27, 1962.

CITATION TO OPINION BELOW

The opinion of the Nevada Supreme Court, printed in Appendix B hereto, *infra*, p. 2a, is reported in 369 P. 2d 1019.

JURISDICTION

The judgment of the Nevada Supreme Court was entered on March 27, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3),

since rights are claimed under the Constitution and statutes of the United States.

QUESTIONS PRESENTED

In 1955 Nevada granted a divorce decree to respondent wife without an appearance by petitioner husband or personal service on him in Nevada. Subsequently the parties litigated the issue of the wife's bona fide domicile in Nevada before a court in Maryland, where the parties had been domiciled for some years prior to the wife's trip to Nevada. The Maryland court determined that the wife had no domicile in Nevada and that the Nevada decree was void. In an action by petitioner husband to set aside the 1955 decree the Nevada Supreme Court expressly denied full faith and credit to the Maryland judgment and held the 1955 decree a valid determination of marital status in Nevada. On the foregoing facts the questions presented are:

1. Whether the Full Faith and Credit Clause permits Nevada to ignore the Maryland judgment and to hold the 1955 decree, which is invalid in every other State, valid in Nevada.

2. Whether the 1955 decree was a denial of due process for lack of requisite jurisdiction, and whether the Nevada Supreme Court decision reaffirms the denial of due process.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The constitutional provisions and statute involved are U. S. Constitution, Article IV, Section 1 and 14th Amendment, Section 1; 28 U.S.C. Section 1738. They are printed in Appendix A, *infra*, p. 1a.

STATEMENT OF THE CASE

On June 30, 1955 the Nevada District Court granted respondent wife Sarah P. Colby a divorce decree, although petitioner husband Benjamin Colby had neither appeared nor been served with process in Nevada. Prior to respondent's trip to Nevada in March 1955, the parties had been domiciled in Maryland for a number of years. In November 1957 a Maryland court granted petitioner husband a limited divorce and also decreed that respondent's 1955 Nevada divorce was null and void (R. 15). Respondent wife appeared personally in that action and pleaded in bar the Nevada decree of absolute divorce (R. 14). After a hearing in which the parties litigated the issue of whether the wife had a bona fide domicile in Nevada when she obtained her decree, the Maryland court found that she had committed a fraud upon the Nevada court, that she had been domiciled in Maryland and not in Nevada and that the Nevada court was without jurisdiction over the parties (R. 16-18). The Maryland Court of Appeals affirmed. *Colby* v. *Colby*, 217 Md. 35, 141 A. 2d 506 (1958). This Court denied a petition for certiorari, *sub. nom. Appleby* v. *Colby*, 358 U.S. 838 (Oct. 13, 1958).

In February 1960 petitioner sued in the Nevada District Court to vacate the 1955 decree; he alleged that the 1957 Maryland judgment was entitled to full faith and credit (R. 5-8).[1] On his motion for summary

[1] Meanwhile in 1959, in an earlier attempt to clarify his marital status, petitioner had sought declaratory relief in Florida, where the wife, who had remarried, was then living. The Florida court dismissed his complaint and in May 1960 the Florida District Court of Appeals affirmed, on the ground that under Florida law there was no justiciable controversy. *Colby* v. *Colby*, 120 So. 2d 797 (Fla. App., 1960).

judgment the Nevada District Court ruled that the Maryland judgment was entitled to full faith and credit; it set aside the 1955 Nevada divorce decree, declaring it null and void (R. 48-50).

The Supreme Court of Nevada reversed. *Colby* v. *Colby*, 369 P. 2d 1019 (March 27, 1962). It rejected petitioner's contention that the Full Faith and Credit Clause required Nevada to "recognize the Maryland decree as the binding determination of the parties' marital status *in Nevada.*" (emphasis in original) The court reasoned as follows (369 P. 2d at 1023):

> "Analysis demands the conclusion that Benjamin [petitioner] does not here ask us to merely accord full faith and credit to the Maryland decree. Instead, we are asked to give it greater credit and respect than the prior decree of our own State lawfully entered. Full faith and credit does not require, nor does it contemplate, such action from us."

The court also rejected petitioner's contention that Nevada's 1955 decree was void for lack of jurisdiction. It said, 369 P. 2d at 1022:

> "The record before us shows that the Nevada court had jurisdiction to enter the decree. Procedural due process was accorded the defendant therein. The decree was not void on the face of the record. . . ."[2]

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[2] The court further held that petitioner's action was not authorized under Rule 60(b) of the Nevada Rules of Civil Procedure, because the alleged fraud was not "extrinsic." The court stated at p. 1021:

> "The 'fraud' involved in the instant case is *simply* the finding by the Maryland court in a later action, that Sarah did not possess the required bona fide intent as to domicil

The court concluded (369 P. 2d at 1023):

> "We hold, therefore, that the default decree of divorce granted Sarah by the Nevada district court in 1955 is a valid, final and conclusive determination of the marital status of Sarah and Benjamin in Nevada; that a claim for relief is not asserted under the full faith and credit clause of the United States Constitution."[3]

REASONS FOR GRANTING THE WRIT

1. THE CASE PRESENTS IMPORTANT QUESTIONS UNDER THE FULL FAITH AND CREDIT CLAUSE.

A. Nevada's refusal to honor the 1957 Maryland judgment and the reaffirmation of Nevada's conflicting 1955 default decree offend the basic purpose of the Full Faith and Credit Clause.

The basic purpose of the Full Faith and Credit Clause is to attain uniformity and certainty in respect to the effect of judgments throughout the Nation. The Nevada decision here sought to be reviewed clashes with that objective.

Unlike the Nevada court in 1955, the Maryland court had jurisdiction over the parties and the subject mat-

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when she testified before the Nevada court, and thereby committed a 'fraud' upon it." (emphasis supplied)

The court also held (at p. 1022) that declaratory judgment was not available, but proceeded to grant declaratory judgment in favor of respondent by holding the 1955 decree valid in Nevada. 369 P. 2d at 1023.

[3] Although the Nevada court discussed local procedures under Rule 60(b), Nevada Rules of Civil Procedure, and under the Uniform Declaratory Judgments Act, it plainly recognized that, if the Full Faith and Credit Clause was applicable, it would be required to entertain the action and set aside the 1955 decree, notwithstanding its local procedures. *Broderick* v. *Rosner*, 294 U.S. 629, 639-643 (1953); *Kenney* v. *Supreme Lodge*, 252 U.S. 411, 415 (1920).

ter. Its judgment declaring the Nevada decree void for lack of the requisite domicile in Nevada was entitled to full faith and credit by sister States. *Sutton* v. *Leib*, 342 U.S. 402, 408 (1952); see *Davis* v. *Davis*, 305 U.S. 32, 42 (1938). Yet Nevada, the one State in the Union where a solemn public record—the 1955 decree of absolute divorce—squarely conflicts with the Maryland judgment, has denied full faith and credit.

Under the decisions of this Court the Maryland judgment should operate as a binding declaration of marital status in all fifty States. *Williams* v. *North Carolina II*, 325 U.S. 226 (1945); *Sutton* v. *Leib*, *supra*. Indeed, a federal statute provides that such a judgment "shall have the same faith and credit in *every* court within the United States" as it has in the State where it was entered. 28 U.S.C. § 1738 (emphasis supplied). If the Nevada decision remains law, a judgment in the State of domicile declaring an *ex parte* Nevada divorce void for lack of domicile will be entitled to full faith and credit in every State except Nevada where the divorce decree is on record. Although the divorce will be void elsewhere, it will remain valid in the divorce State. Confusion, uncertainty, and conflict will inevitably result in respect to marital status, property, inheritance and other matters.

This Court has held that a divorce decree shall be entitled to full faith and credit everywhere, if defendant has appeared and participated, *Sherrer* v. *Sherrer*, 334 U.S. 343, 351-352 (1948); *Coe* v. *Coe*, 334 U.S. 378, 384 (1948); *Johnson* v. *Muelberger*, 340 U.S. 581, 587 (1951). This binds the State where the parties were formerly domiciled, even though the result conflicts with the public policy of that State. *Sherrer* v. *Sher-*

rer and *Coe* v. *Coe, supra*. *A fortiori* the Maryland decree here should be given full faith and credit in Nevada. *Sutton* v. *Leib, supra*, 342 U.S. at 408. Maryland is the State where both parties were domiciled and the only State where they litigated the question of jurisdiction.

This Court has recognized that questions of the kind here presented involve federal issues of profound importance. See, *e.g.*, *Sherrer* v. *Sherrer*, *Coe* v. *Coe*, *Johnson* v. *Muelberger*, and *Sutton* v. *Leib*, all *supra*.

On the foregoing grounds alone, this Court should review the Nevada judgment.

B. Nevada's denial of full faith and credit conflicts with decisions of this Court, especially Sutton v. Leib.

In *Sutton* v. *Leib, supra*, this Court determined that a judgment in the State of domicile holding a Nevada divorce void for lack of bona fide domicile is entitled to full faith in every other State, including Nevada. This Court stated:

> "If the Nevada court had had jurisdiction by personal service in the state or appearance in the case of Henzel and the first Mrs. Henzel, its decree of divorce would have been unassailable in other states. So as to the New York decree annulling the marriage, New York had such jurisdiction of the parties and its decree is entitled to full faith *throughout the Nation, in Nevada as well as in Illinois.*" (emphasis supplied) (342 U.S. at 408)

The Nevada court below held *Sutton v. Leib* distinguishable. It characterized as dictum the statement that the decree was entitled to full faith in Nevada. 369 P 2d at 1022-1023. Actually, in the *Sutton* case this

Court reversed a specific holding below that the Nevada decree was valid in Nevada. 342 U.S. at 404.

The Nevada court justified its decision on the ground that the Constitution does not require it to give the Maryland decree "greater credit and respect than the prior decree of our own State lawfully entered." 369 P. 2d at 1023. But the essence of the Full Faith and Credit Clause compels Nevada to subordinate its own policy to the Maryland decree. *Johnson* v. *Muelberger, supra,* 340 U.S. at 584; *cf. Treinies* v. *Sunshine Mining Co.,* 308 U.S. 66, 74-78 (1939). The queston whether Nevada's 1955 decree was "lawfully entered" was the very question which was litigated for the first time in Maryland, where the court found the decree was *not* lawfully entered.

Because the Nevada judgment below conflicts with this Court's controlling decision in *Sutton* v. *Leib,* the judgment should be reviewed.

C. If Sutton v. Leib is not controlling, this is an important case of first impression.

Assuming *arguendo* that *Sutton* v. *Leib* does not control, then this is an important case of first impression. It presents the question whether Nevada may grant an *ex parte* divorce without bona fide domicile of the plaintiff, and then deny full faith and credit to the judgment of a court with unquestioned jurisdiction, holding the Nevada decree void for lack of jurisdiction.

If *Sutton* v. *Leib* is not controlling, the novelty and importance of the case call for review.

II. THE 1955 DECREE AND NEVADA'S REAFFIRMANCE THEREOF VIOLATE THE DUE PROCESS CLAUSE.

The decision below raises important questions under the Due Process Clause. A divorce granted outside the domicile of either party and without personal jurisdiction over the defendant is invalid under the Due Process Clause in the State where it is granted. *Williams* v. *North Carolina II*, *supra*, 325 U.S. at 229; *Alton* v. *Alton*, 207 F. 2d 667, 676 (C.A. 3, 1953), certiorari granted, 347 U.S. 911 (1954), dismissed as moot, 347 U.S. 610 (1954); Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study*, 65 Harv. L. Rev. (1951) 193, 212, n. 57.

If respondent wife were domiciled in Nevada when the 1955 decree was granted, the Full Faith and Credit Clause would require sister States to recognize that decree. But clearly, as the Nevada Supreme Court tacitly admits, the 1955 decree was not entitled to such recognition. It was not so entitled because respondent did not have the requisite Nevada domicile in 1955. It follows, therefore, that the decree was invalid in Nevada under the Due Process Clause. For if a Nevada decree is given validity in that State, our ancient federal statute requires that the judgment "shall have the same full faith and credit in every court within the United States. . ." 28 U.S.C. § 1738. Here the 1955 decree, not being entitled to full faith and credit for lack of domicile, must be held invalid in Nevada, "because offensive to the Due Process Clause of the Fourteenth Amendment. 28 U.S.C. Section 1738." *Hanson* v. *Denckla*, 357 U.S. 235, 255 (1958); see *Vanderbilt* v. *Vanderbilt*, 354 U.S. 416 (1957); Lorenzen, *Extra-Territorial Divorce—Williams* v. *North Carolina II*, 54 Yale L.J. (1945) 799, 806.

In oral argument below, petitioner contended that the 1955 decree was void for lack of the requisite domicile. The Nevada court rejected this contention and held, 369 P. 2d at 1022:

> "The record before us shows that the Nevada court had jurisdiction to enter the decree. Procedural due process was accorded the defendant therein. The decree was not void on the face of the record . . ."

These statements are groundless. (1) The record contained the Maryland findings and judgment which established conclusively that in 1955 the Nevada court was without jurisdiction. See *Barber* v. *Barber*, 47 Nev. 377, 222 Pac. 284 (1924). (2) In the 1955 action petitioner was not accorded procedural due process. On the contrary, the court adjudicated his marital status when neither party was domiciled in Nevada. (3) The statement by the court below that the 1955 decree was "not void on the face of the record" evades the whole question at issue. This Court held in *Williams* v. *North Carolina II*, *supra*, 325 U.S. at 234, that "simply because the Nevada court found that it had power to award a divorce decree cannot . . . foreclose reexamination by another State." For,

> "Otherwise, as was pointed out long ago, a court's record would establish its power and the power would be proved by the record."

Such "circular reasoning," as this Court has called it, is the very reasoning embraced in the Nevada opinion.

The 1955 decree was void for lack of jurisdiction and denied petitioner due process. In holding that "the default decree of divorce granted Sarah by the Nevada

district court in 1955 is a valid, final and conclusive determination of the marital status of Sarah and Benjamin in Nevada," the Nevada Supreme Court has reaffirmed and affixed its seal to the denial of due process. Such a decision should not be permitted to stand.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Unless the Nevada judgment is reversed, it will measurably destroy the force of the Full Faith and Credit Clause. It will encourage migratory divorce States to disregard judgments of the State of domicile and to uphold invalid divorce decrees. It will result in confusion and uncertainty regarding marital status, property and inheritance. It will make for calloused acceptance of bigamous relations and lend support to the untenable proposition that an *ex parte* decree of divorce is impervious to effective attack.

Respectively submitted,

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